



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Appeal 46 of 2008**

**SIRET TEA ESTATE ..... APPELLANT**

**VERSUS**

**ROBERT KARERI ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

This is an application by way of Notice of Motion brought under Order XLI Rule 4, Order L Rule 1 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act for stay of execution of the Decree in Eldoret CMCC. No. 469 of 2005 pending the hearing and determination of Appeal which has already been lodged. In support of the application SHABBIR MALOO, the Assistant Manager of the Appellant has sworn an affidavit giving grounds.

The application is opposed by the Respondents who have filed a Replying Affidavit sworn by ROBERT KARERI on 13<sup>th</sup> October, 2008 and at the same time raised a preliminary objection to the application on the following grounds:-

- (a) That the application is bad in law, incompetent and fatally defective and in utter contravention of the mandatory provisions of the Order XLI Rule 4.
- (b) That the issues raised in the application are res-judicata and the same were settled in the trial Magistrate's Ruling dated 22<sup>nd</sup> July, 2008.

When the application came before me for hearing on 30<sup>th</sup> September both parties recorded a consent order to the effect that the ruling be written and delivered based on the affidavits evidence on record and the preliminary objection raised to the application.

The facts which gave rise to this litigation as gathered from the affidavit evidence briefly may be stated.

The Appellant was sued in the Chief Magistrate's Court Eldoret in Civil Case No. 469 of 2005 which was decided in favour of the Respondent. Immediately the Judgment was delivered on 3<sup>rd</sup> April, 2008 the Applicant applied for stay of execution pending appeal which application was filed on 13<sup>th</sup> June, 2008. The application was heard and a ruling was delivered on 22<sup>nd</sup> July, 2008 allowing the application on the following conditions:-

- (a) Half ( $\frac{1}{2}$ ) of the decretal sum be paid to the Plaintiff's Advocate within thirty (30) days from the date of the ruling.
- (b) The other half ( $\frac{1}{2}$ ) to be deposited in a joint interest earning account in the names of the Advocates on record within thirty (30) days.

The Applicant was to comply with the order dated 22<sup>nd</sup> July, 2008 which lapsed on 22<sup>nd</sup> August, 2008. Having considered the application in light of the affidavit evidence on record, I make the following observations. Judgment in this suit was delivered in Eldoret CMCC No. 469 of 2005 on 3<sup>rd</sup> April, 2008 in favour of the plaintiff against the defendant for a sum of Shs. 651,000/=. The Appellant being dissatisfied with that Judgment expressed desire to appeal against that Judgment to this Court.

In the meantime the appellant on 13<sup>th</sup> June, 2008 applied in that Court for stay of execution of the decree pending the intended appeal. The Court delivered its ruling on 22<sup>nd</sup> July, 2008 granting stay on two conditions namely to pay half (½) of the decretal sum to the advocate for the plaintiff within thirty (30) days from the date of the ruling and the other half (½) of the decretal sum to be deposited in a joint interest earning account in the names of the advocates on record within thirty (30) days. The Appellant has not complied with those conditions and now he comes to this Court for similar orders.

The Appellant having applied for orders of stay before the trial Court and having obtained the same I agree with Counsel for the Respondent that this application is res-judicata. Even if the Appellant was not satisfied with those conditions, he ought not to have come to this Court seeking similar orders. The Applicant could either seek orders for review to vary or set aside those conditions.

That being the view I have taken, the Appellant's application lacks in merit and the same is dismissed with costs to the Respondent.

DELIVERED AND DATED AT ELDORET THIS 14<sup>TH</sup> DAY OF OCTOBER, 2009.

**J. L. A. OSIEMO**

**JUDGE**